cross in the box between the German *"ABGEREIST"* and the French *"PARTI"*. This cover was never translated into English. I know no German but I know the French word *"parti"* to mean *"left"* or *"departed"*. Looked at carefully, there is nothing either in the letter from the registrar or in the so-called summons to indicate that the defendant in November, 1966 had left the country. All that was indicated is that he had left his then address. It therefore seems to me that counsel for the plaintiff is right in denying that there was any actual admission on his part that the defendant had left Austria.

It is of course not known when the defendant left his address in Austria but if all that can be said is that he had left his address by November, 1966, that does not mean that he had left Austria. In the absence of any information or proof that he had left Austria altogether, then it does not seem to me correct on this alone to say that the publication of the notice in the *Wiener Zeitung* on 6th December, 1967 cannot be taken to be sufficient to bring the action to the notice of the defendant. It thus appears to me on a proper and reasonable reading, that counsel for the applicant has failed to establish the basis on which he has grounded his application.

On the other hand, there would appear to be confirmation that the defendant was in Austria at the relevant time. It is not very material as the onus is on the applicant to establish that the order for substituted service was wrongly obtained and executed. However, Dr. Walter Hecht who was engaged by the plaintiff to effect the substituted service by posting at the Town Hall or at any prominent place in Post Riegersburg, Steiermark, Austria, to comply with the original order for substituted service wrote on the 28th February, 1967 in the following terms:—

"Neither is it possible to have a notice posted on an official notice board. I therefore wrote a registered letter to Koplan which obliged him either to sign the receipt or to state that he refuses to accept the letter. This was returned to me as Koplan had moved and when I wrote to his address indicated by the post, that was returned to me with the note "left the country". This latter card I can forward to you if that is any good to you (I can also add a translation of the postal note if you want to.)."

On a careful reading of this letter, it seems to me reasonably certain that at the very least, after leaving the address, the defendant had at least one other address if not several other addresses in Austria before leaving the country, that when Dr. Walter Hecht wrote to the defendant at an address in Austria which of course need not be the one on the writ of summons, the letter was returned with intimation of another address in Austria, and that from this last address or from some subsequent address, the defendant left the country. The date of such departure is of course not at present ascertained but it is in my view quite definite that it was subsequent to the order for substituted service and very probably subsequent to the publication in the *Wiener Zeitung*.

The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Dharmananda & Co.; L.H. Singh & Co.*

CHAI HUAT SENG v. HOCHTIEF-HOLZMANN

[O.C.J. (Chang Min Tat J.) May 30, 1969]
[Ipoh — Civil Suit No. 676 of 1967]

Practice and Procedure — Appearance — Dismissal of action for failure of plaintiffs to appear at hearing — Application for restoration case — Negligence of plaintiffs' solicitors — Action not time-barred — Order for restoration — Plaintiffs to pay costs.

A solicitor of a firm of solicitors who acted for the plaintiffs left the country after the case had been set down for trial by the defendants under the impression that the case would not come on for hearing until after a year from then. During the absence of the solicitor the defendants obtained a consent order for an early trial on the ground that a material witness of theirs who had full and personal knowledge of the matters involved in the case was leaving the country. While the solicitor was still away a date for the hearing of the case was fixed and the plaintiffs' firm of solicitors were notified of the date.

The case came on for hearing on the fixed day by which day the solicitor had returned and assumed his functions but had not been notified of the fact that the case had been fixed for hearing. At the hearing the plaintiff and their counsel failing to appear, the action was dismissed with costs. The solicitor first came to know of the dismissal when his firm received the draft dismissal order from the defendants. Within six days he applied under O. 36 r. 33 to have the case restored for hearing.

The defendants resisted the application on the ground that the restoration would cause great injury to them in that their key witness had left the country and all their witnesses had dispersed so that it was very difficult or impossible to gather them together.

Held: (1) the solicitors of the plaintiffs had been negligent and their mistake must be condemned;

(2) since limitation did not apply it was open to the plaintiffs to re-institute their claim by a fresh claim. In view of this the objection of the defendants was not as substantial as it would appear at first and whatever injury they had suffered could be compensated by costs. The action must therefore be restored, the defendants having all the costs thrown away and of and incidental to the application.

Case referred to:—

(1) *Burgoine* v. *Taylor* (1878), 9 Ch. D. 1.

CIVIL SUIT.

R.C. Hoffman for the plaintiffs.

P. Mooney for the defendants.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application by the plaintiffs for the restoration of the case for hearing after its dismissal on the 7th of November, 1968 when the claim was struck out with costs upon the failure to turn up at the hearing of both the plaintiffs and their counsel. The application though expressed to be under R.S.C. Order 27 rule 15 was one really made under Order 36 rule 33 and with the agreement of counsel for the respondents the application was at the hearing accordingly amended.

Mr. Hoffman, counsel for the plaintiffs, in an affidavit in support of his application explained that he left the country on long leave on the 15th of June, 1968 and that at this time he was under the impression that the action would not be entered for trial and set down in the fixing list before mid-1969. There is in fact in the court file a notice of trial filed by the defendants solicitors on the 6th July, 1968 in which the particulars entered by the then Senior Assistant Registrar of this court indicated that the case would only be set down prospectively in the fixing list on the 7th June, 1969. That procedure was clearly wrong and has since been corrected. Be that as it may, on the 3rd August, 1968 the solicitors for the defendants applied by summons in chambers to the High Court for an early trial. The summons was served on the solicitors for the plaintiffs and came up for hearing on the 19th August. On this day the solicitors for the plaintiffs were represented by agents and by consent a date in late November, 1968 was to be fixed by the Senior Assistant Registrar for the hearing of this case. On the 6th September, 1968 Mr. Davidson appearing for both the plaintiffs and the defendants before the Senior Assistant Registrar obtained the 7th and 8th November for the hearing of this case. There is of course no record in the court file whether Mr. Davidson did inform the solicitors for the plaintiffs though in my view the presumption would be that he did. In any event by a notification issued by this court on the same day, that is the 6th of September, 1968 to both solicitors notice of hearing on the 7th and 8th November was given. It must be taken therefore that on or about this day the solicitors for the plaintiffs knew of the date of hearing and that the curious procedure hitherto adopted by this registry had not the effect of misleading the plaintiffs or their solicitors.

In his affidavit Mr. Hoffman also said that during his absence on leave he was not aware of the application for an early trial and of the subsequent notice of hearing. He returned from leave in the latter part of September 1968 and was immediately thereafter engaged in his work without being advised at any stage that the case had indeed been fixed for hearing. He first came to know of the dismissal of the action when his firm received the draft order from the solicitors for the defendants. Within 6 days of coming to know he made the application herein.

Mr. Mooney for the defendants made no objection or no serious objection as to the time factor when the application came up for hearing on the 3rd February, 1969 and it was heard on the basis that it was made in good time. Mr. Hoffman submitted to such terms as the court might think fit and prayed for the restoration of the action to the hearing list.

The short answer and of course it is the correct answer made by Mr. Mooney was that Mr. Hoffman might be the counsel for the plaintiffs but the solicitors on record were Messrs Allen & Gledhill of which firm Mr. Hoffman was a partner and there was nothing in the affidavit of Mr. Hoffman to explain the mistake of the solicitors in not instructing counsel to appear at the hearing so as to merit the discretionary exercise of the court's jurisdiction. But substantially the objection of Mr. Mooney was based on the great injury to his clients if the case was restored. The previous application for an early trial was made because his principal witness was the only remaining executive of the defendants' firm who had full and personal knowledge of the matters involved in the case. He had been retained, as I understand it, in this country until the hearing but has now since left the country. All his other witnesses who were engineers or labourers employed by the engineering firm had at the conclusion of its undertakings been dispersed and it is now very very difficult if not impossible for him to gather them together again. It was his submission that the case being a claim on an oral agreement turned on the credibility of witnesses and that any evidence taken *de bene esse* would not be satisfactory.

There is no doubt it seems to me that the solicitors had been negligent. There is no reasonable explanation before me for this negligence. It is, as I am aware, a common mistake in our present system of fused professions and solicitors who also appear as counsel must guard against the making of such mistakes. The mistake of course is in my view a much more serious one than in the case of *Burgoine* v. *Taylor* [1] and in my view comes fairly within

the terms of the castigation of Fry J. and does not merit the lenient view taken by the Court of Appeal in that case.

But however one can condemn the mistake here, one must bear in mind that since limitation does not apply it is always open to the plaintiffs to re-institute their claim by a fresh action. A new suit would then bring the whole matter again into court. In view of this it seems to me that the objection of the defendants is not as substantial as it would at first appear. Whatever injury they had suffered, it could be compensated by costs.

I therefore propose to exercise my discretion in favour of the applicant, set aside the order dismissing the action and restore it to the hearing list. The defendants will of course have all costs thrown away and of and incidental to this application and I would assure the defendants that when it comes to fixing the date for hearing, any difficulties they may have in presenting their case or gathering their witnesses will be duly considered.

Application granted.

Solicitors: *Allen & Gledhill; Skrine & Co.*

LIM AH TOH v. ANG YAU CHEE & ANOR.

[O.C.J. (Raja Azlan Shah J.) June 5, 1969]
[Kuala Lumpur — Civil Suit No. 1183 of 1965]

Negligence — Driving at excessive speed and failure to keep proper lookout — Plea of guilty to charge of inconsiderate driving — Whether admissable as evidence of negligence — Whether driver of vehicle is agent of owner — Vicarious liability of owner.

The plaintiff in this case claimed damages for the death of her son who was killed in an accident alleged to be caused by the negligence of the first defendant, the driver of a motor-van in which the deceased was a passenger. On the evidence it appeared that the first defendant was driving at an excessive speed and without keeping a proper lookout under unfavourable weather and road conditions. He pleaded guilty to a charge of inconsiderate driving in connection with the accident. At the time of the accident the first defendant and the deceased were travelling to Port Swettenham to borrow a tarpaulin which was required for the wedding of the brother of their employer, the second defendant who was the owner of the vehicle.

Held: (1) on the facts this was a clear case of travelling at an excessive speed and without keeping a proper lookout under unfavourable weather and road conditions and therefore the first defendant was *prima facie* negligent;

(2) the plea of guilty of the first defendant to the charge of inconsiderate driving was an admissible admission which supported the plaintiff's case;

(3) the journey in this case was undertaken for the purpose of the employer and therefore the employer, the second defendant was vicariously liable for the negligence of the first defendant.

Cases referred to:—

(1) *Menon* v. *Pigeonneau* [1957] M.L.J. 85.

(2) *Tan Giok Hue* v. *Lim Swee Peng* [1960] M.L.J. 190, 191.

(2) *Laurie* v. *Raylan Building Co. Ltd.* [1942] 1 K.B. 152, 154.

(4) *Richley* v. *Foull* [1965] 3 All E.R. 109, 119.

(5) *Browne* v. *De Luxe Car Services* [1941] 1 K.B. 549. 553.

(6) *Noor Mohamed* v. *Palanivelu* [1956] M.L.J. 115.

(7) *E.A. Long* v. *Wong Chin Wah* [1957] M.L.J. 163.

(8) *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753.

(9) *Wong It Yong* v. *Lim Gaw Teong* [1969] 1 M.L.J. 79, 80.

(10) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 191, 196.

(11) *Lee Chong* v. *Tan Kwee Low* [1961] M.L.J. 98.

CIVIL SUIT.

G. Tara Singh Sidhu for the plaintiff.

D.P. Vijandran for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: The first defendant while driving a motor-van belonging to the second defendant collided with an oncoming omnibus on the wrong side of the road and as a result the deceased who was a passenger in the said motor-van was killed. The plaintiff (mother of the deceased) brings this action as administratrix of his estate and on her own behalf under sections 7 and 8 of the Civil Law Ordinance, 1956. She alleges that her son's death was caused solely by the negligence of the first defendant, the servant or agent of the second defendant, thus making the latter vicariously liable for his negligence.

The defence as pleaded is two-fold: (1) a denial of negligence on the part of the first defendant and (2) the deceased caused and or induced the said negligence by compelling the first defendant to drive fast and in the circumstances the deceased knew or ought to have known that there would be a risk of injury to him and by so compelling the first defendant he impliedly consented to the said risk. The latter defence is refuted by the first defendant himself. In his evidence he testified that the deceased did not compel him to drive fast. Therefore that defence does no longer fall for consideration.

Ordinarily, both the first defendant and the deceased were employees of the second defendant who runs a plumbing business. The day in question was not a working day. They were assisting their employer with his brother's wedding arrangements. The ceremony was to be held at his house in Klang. The first defendant